IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1412 OF 2007

A.Masjid Shaikh Bashir ...Petitioner
Versus
Afsana Bano Jakhir Hussain ...Respondent

Shri K.K.Tated for the Petitioner.
Shri S.K.Shinde i/by Shri Vinod Shah for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 27, 2007.

P.C.:

1. Heard the learned counsel appearing for the parties. By consent taken up for final hearing at the admission stage. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner original Defendant has taken exception to the order dated 05th December, 2006 passed by the trial Court on Application at Exhibit 35.

2. It will be necessary to refer to facts of the case in brief. The Respondent filed a suit for possession of the suit property more particularly described in paragraph No.1 of the plaint. An affidavit of evidence of Dr. Zakir Mohammed Ismail, the constituted attorney of the Respondent was filed on 23rd November, 2005. On 19th September, 2006 the Advocate for the Respondent made an endorsement on the said affidavit that he was not pressing the said affidavit. In view of the said endorsement, the present Petitioner

applied by an Application at Exhibit 35 pointing out that once an affidavit of examination-in-chief was filed it becomes part of the evidence and therefore, the same cannot be withdrawn. A contention was raised that without the permission of the Court no such endorsement could have been made by the Advocate for the Respondent. On the said Application, the impugned order has been passed. The learned Judge observed that as the act of not pressing the affidavit before the witness steps into witness box amounts to revocation of the general power of attorney. The learned Judge directed that the said affidavit will not be read in evidence.

3. After having heard the learned Advocates appearing for the parties, I find that the view taken by the learned trial Judge is erroneous. The affidavit of examination-in-chief of Dr.Zakir was taken on record and exhibited as Exhibit 17. It was not open for the Respondent either to withdraw the said affidavit or to say that he was not pressing the said affidavit. The affidavit was infact the examination-in-chief of the said witness. If the said witness was not ready to offer himself for the cross-examination, it was for the trial Court to pass appropriate order or to draw appropriate inference.

4. Once the affidavit of examination-in-chief was

filed it was not open for the Advocate for the Respondent to make such an endorsement on the said affidavit. The view taken by the trial Court that the action of making an endorsement "not pressed" amounts to revocation of the general power of attorney granted in favour of the witness is completely erroneous. The direction issued by the trial Court that the affidavit will not be read in evidence will have to be set aside.

5. Hence, I pass the following order:

(i) The impugned order dated 05th December, 2006 passed below Exhibit 35 is quashed and set aside.

(ii) The affidavit of examination-in-chief filed by Dr. Zakir Hussain Mohammad Ismail at Exhibit 17 will continue to be on record. If the Respondent fails to produce the said witness for cross-examination by the Petitioner, it will be open for the trial Court to pass appropriate order and/or to draw appropriate inference.

(iii) Writ Petition is allowed in above terms with no orders as to costs.

(iv) All contentions of the parties in the pending

suit are kept open.

JUDGE